

DEPARTMENT OF FINANCIAL INSTITUTIONS

TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov



Opinion – “FBO Accounts - Do Not Qualify as Eligible Securities under the Money Transmission Act”

September 24, 2012

Re: ____ - Eligible Securities

Dear ____:

This is in response to your letter, dated July 13, 2012, various subsequent email communications, and to our teleconference of August 29, 2012, all regarding whether bank deposits held for the benefit of a licensee’s customers (FBO accounts) can be considered an eligible security, if the bank issues a “no lien” letter waiving “any right, charge, security interest, lien, set-off or claim of any kind against” . . . the licensee.

The applicable code sections governing the eligible security requirement are California Financial Code (FC) §§ 2081 and 2084. FC § 2081 requires that a licensee must “at all times own eligible securities” having a specified value. FC 2084(a) defines ownership as follows: “A licensee shall be deemed to own an eligible security only if the following apply:

- (1) The licensee owns the eligible security solely and exclusively in its own right, both of record and beneficially.
- (2) The eligible security is not subject to any pledge, lien, or security interest.
- (3) The licensee can freely negotiate, assign, or otherwise transfer the eligible security.”

As we discussed in our phone call, the Department of Financial Institutions (DFI or the Department) holds that each element of FC 2084(a) must be met in order to establish ownership. Therefore, if any one element is untrue, then ownership does not hold for eligible securities purposes.

In the case at hand, ____ holds FBO accounts at ____ Bank (Bank) and Bank has issued a “no lien waiver” to _____. The agreement between ____ and Bank, dated June 1, 2012, clearly states that the ____ accounts are “on behalf of and for the benefit of its [____’s] customers.” FBO accounts, by their very nature, cannot be “owned” by a licensee as required by FC § 2084(a). These accounts are deposits held for the benefit of the licensee’s customers, not the licensee. Thus, ____ cannot own the FBO accounts “both of record and beneficially.” The lack of ownership exists even if there is

an effective “no lien” agreement in place because all three elements of FC 2084(a) have not been met, namely element (1).

Accordingly, the Department reaffirms its conclusion that FC § 2084(a) precludes _____ from treating FBO accounts as eligible securities because FBO accounts cannot be owned by a licensee.

Sincerely,

/s/ Paul T. Crayton

PAUL T. CRAYTON
Senior Counsel

PTC:lca

cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco